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No.

IN THE

Supreme Court of the United States

October Term, 1982

BENNY CONIGLIO,

Petitioner,

v.

WARDEN, CLINTON CORRECTIONAL FACILITY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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ISSUES PRESENTED

1. Whether uncontradicted and corroborated testimony of a prosecution witness tending to negate the intent necessary for accessoria liability, must be considered in evaluating the sufficiency of the evidence under *Jackson v. Virginia.*

2. Whether the evidence of guilt satisfied the standards of *Jackson v. Virginia.*

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IN THE SUPREME COURT OF THE UNITED STATES

BENNY CONIGLIO,

Petitioner,

-against-

WARDEN, CLINTON CORRECTIONAL FACILITY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICE OF THE UNITED STATES SUPREME COURT

Petitioner, Benny Coniglio, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit which affirmed a judgment of the United States District Court for the Southern District of New York dismissing petitioner's petition for a writ of habeas corpus, pursuant to 28 U.S.C. Sec. 2254, seeking relief from a New York State judgment convicting him of a second degree murder [N.Y. Penal Law Sec. 125.25(1)] and sentencing him to a term of imprisonment with a maximum of life and a minimum of twenty-five years.

OPINIONS BELOW

A copy of the unreported opinion of the Court of Appeals, rendered March 4, 1983, is annexed hereto as Appendix A. A copy of the District Court's unreported decision, rendered is annexed hereto as Appendix B. On his direct appeal to the Appellate Division of the Supreme Court of the State of New York, petitioner's judgment was affirmed without opinion. *People v. Coniglio,* 74 A.D.2d 1004 (1st Dept. 1980), and permission to appeal to the New York Court of Appeals was also denied without opinion. *People v. Coniglio,* 50 NY2d 1000 (1980) (Meyer, J.).

JURISDICTION

The judgment of the Court of Appeals was entered on March 4, 1983. Petitioner remains incarcerated in a New York State correctional facility, pursuant to the judgment of conviction which is the subject of this petition.

The Court's jurisdiction is invoked pursuant to 28 U.S.C. Sec. 1254(1).

STATUTES INVOLVED

New York Penal Law Sec. 125.25—Murder in the second degree

A person is guilty of murder in the second degree when:

> 1. With intent to cause the death of another person, he causes the death of such person or of a third person . . .

New York Penal Law Sec. 20.00—Criminal liability for conduct of another

When one person engages in conduct which constitutes an offense, another person is criminally liable for such conduct when, acting with the mental culpability required for the commission thereof, he solicits, requests, commands, importunes, or intentionally aids such person to engage in such conduct.

STATEMENT OF THE CASE

State Proceedings

The Trial

On the night of May 27-28, 1973, Tommy Genco, who worked as a doorman at the Cabaret Lounge disco bar was shot in the head and killed outside the bar.

The prosecution evidence at trial was, as stated by the trial court, purely circumstantial, since there was only one witness to the actual shooting and he could not identify the occupants of the car, nor which of the occupants shot Genco. The prosecution evidence, even conceding the truthfulness of the State witnesses and granting all reasonable inferences, still falls far short of that required by the United States Constitution as set forth in *Jackson v. Virginia*, 443 U.S. 307 (1973).

The Events Inside the Bar

It was uncontested that Coniglio and Clementi[1] were in the bar on the evening of the shooting. An employee of the bar, Jack Skulsky, the barman, stated that he had seen Coniglio and another man in the bar arguing with Genco (58-59). During the argument, the other man, identified as "Cleme," slapped Genco in the face (58-60). Skulsky also testified that some time after this argument, Coniglio, "Kind of indicated that it wasn't over" (60).[2] Skulsky also testified that he noticed that both Coniglio and Cleme had bulges in their waist bands (62).[3]

Other witnesses generally corroborated Skulsky's testimony about Coniglio's presence in the bar, but oddly, despite Skulky's testimony that the argument was "loud" (59) and that, immediately after the argument, Coniglio and "Cleme" left the bar (62), none of the other witnesses testified as to any argument or slapping.

John Genco, a patron and the victim's brother testified that he got to the bar at about 3:00 to 4:00 a.m. and saw his brother there (416). He also saw three men sitting at the bar, looking at his brother (418). Genco was quite certain that his brother neither spoke to these men nor " . . . paid no attention to them"

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1. On or about May 8, 1983, co-defendant Clementi filed a petition for a writ of certiorari. Said petition is still pending.

2. Skulsky never stated upon what statements of Coniglio his conclusion was based.

3. From this, and from the fact that he saw what looked like a handle on the bulge at "Cleme's" waistband, Skulsky concluded that both men were carrying guns (62).

(418). Genco then saw one of the three men leave and about twenty minutes later, while he was talking to his brother, the other two men left (420).[4]

Dante Musci, a patron, who knew Coniglio and Clementi saw them in the bar that night, but he observed no argument or slap (267, 323-324).

Theresa Cicale, a patron, testified that she spoke to Coniglio in the bar at about the time he left the bar and that he had asked her to come home with him (991, 993). She did not testify as to any conversation, argument, or slapping involving Genco in the bar.

Neither Nick DiGiorno, a patron, nor Michael Vivenzio, the co-manager, both of whom were in the bar that evening around the time of the shooting, saw or heard any argument or slapping incident.

Gus Santoro, the owner of the bar, did see Genco engaged with Coniglio, Clementi, and Cicale in a "loud conversation," but he saw no slap, nor could he characterize the conversation as an argument (1036, 1055-56). Moreover, Santoro could not say what was being said nor whether Coniglio, specifically, was involved in the loud conversation.

At this point, even accepting the strongest case for the prosecution, the only evidence is that Coniglio was in the bar with Clementi, there was a verbal argu-

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4. It must be noted, that Skulsky placed the argument and slap as immediately preceding Coniglio and "Cleme's" leaving the bar (62). John Genco's testimony was clear that he watched his brother and the three men (later two men) for a considerable period of time before the last two of them left. Yet, he observed neither the "loud" argument nor the slap.

ment with Tommy Genco and that Clementi, not Coniglio, slapped Genco.

Events Outside the Bar

After this argument, Coniglio and Clementi left the bar, leaving John and Tommy Genco in conversation in the bar (62, 420, 1037). Shortly thereafter, Tommy Genco left the bar. Skulsky and John Genco, joined him in a conversation outside the bar (63, 324, 420). After this conversation, Skulsky went back in the bar, John Genco went to get his car, and Tommy Genco remained in front of the doorway to the bar (63, 279, 423).

Coniglio, at this time, was outside the bar. He had "Vinnie" go inside the bar and ask Cicale to step outside. Cicale left the bar and spoke to Coniglio, who again asked her to come with him. Cicale refused and Coniglio gave her a little push (991-993). This conversation with Cicale took place only moments before the shooting of Genco (370, 998). Cicale noticed Tommy Genco and Dante Musci outside of the bar. She then went back inside (347, 422, 993, 998). Genco testified that he saw the two men from the bar standing by a brand new black car with a wheel on the back (421). He saw Cicale abruptly leave with these two men (422). Musci stated that at this time, he saw a dark car double parked outside the bar (381).[5]

Cicale also testified that previously she had driven in a brand new black Buick with Coniglio (994-995). Evidence was introduced that on April 11,

5. Cicale testified that there were other double parked cars in the area (1011).

1973, Clementi bought a black Buick and registered it on May 4, 1973 (565-566). No evidence was offered that the car in which Cicale had ridden was the same car as Clementi's.

The Shooting

DiGiorno testified that he had stepped out of the bar to smoke a cigarette, when he saw Tommy Genco leaning into a "dark car, dark blue, green" car. He then heard a shot and saw Genco fall back from the car as the car "shot away" (980-981). DeGiorno went back into the bar and told Vivenzio that "someone got shot" (980). DiGiorno could not identify the car nor any special features. He could not say who was in the car or from where the shot came. Vivenzio saw DiGiorno come into the bar, close the door quickly and heard him say that "someone got shot" (254). Vivenzio then walked over to the door and walked outside the bar. Once outside the bar, Vivenzio saw a black car speeding off with two men inside (254-255). John Genco, during this time, saw the same double parked black car he had seen earlier, back up into the intersection. The two men inside were the same as those whom he had earlier seen in the bar and speaking to Cicale outside the bar. The shorter man was driving. Genco watched as the two men gazed at him and sped off down the block past the bar (424-425). Vivenzio then saw John Genco in his car and he went with John Genco to try and locate the black car (254-255).

Events After the Incident Evidence of Flight

Detective Marsenison testified that a week after the killing, an alarm was put out for Coniglio and that he investigated Coniglio's whereabouts (490).

Marsenison determined that Coniglio was no longer residing with his parents and that he had gone on vacation (546). Several years later, when Coniglio was arrested, he had in his possession, false identification.

The Admission

Nanette Sanzo testified that during the time that Coniglio lived with her in Florida:

> He told me that he had shot someone in the head in the front of a bar in New York, over ten thousand dollars and he was sitting in a car when it happened (196).

She first told the police of this admission in 1977, four years after it had allegedly been made and at a time when she was a "police informant" and had the incentive to please the authorities and to learn of the details which would please them (217). (Transcript of Wade Hearing, p. 2, 19, 20, 47).

During his summation, the prosecutor stated to the jury:

> I submit to you, very crucially in this case, Benny [Coniglio] was the driver, Cleme is the passenger. Cleme is the heavy in the bar, he does the slapping. Now, follow it one step farther. If you look at the autopsy report and a lot of technical terms, but one thing is very simple, bullet track, the direction of the bullet wound in from front to back, left to right and upward in the deceased's body . . . [T]he shooter in this case, ladies and gentlemen, and you may be very surprised for me to argue it to you, but I do submit it to you most respectfully, and I submit to you from the evidence you can so draw the conclusion beyond a

> reasonable doubt, is Cleme not Benny. The reason why I say that to you is this. Who is the short little braggart that tells Nanette Sanzo, I shot somebody outside of a bar, I, all by myself, me. Nanette who is much taller than him, he says that to her, that's what he says, but he is driving the car, and I submit from the angle of the bullet and that which occurred inside the bar, *the shooter is not Benny, despite what he himself says to a girl in Florida* who doesn't know anything about it. The shooter is Cleme (1475-1486). (Emphasis supplied)

Thus, at trial the prosecution took the position that the admission allegedly made by Coniglio to Sanzo was false and that Coniglio had not shot Tommy Genco.

The State Appeal

The Appellate Division, First Department, affirmed the conviction without a written opinion. On appeal, the prosecution changed its theory of Coniglio's culpability. At trial, the prosecution argued that the admission to Sanzo was false and that it was Clementi who shot Genco. On appeal, the prosecution improperly did a complete about face and argued that Coniglio had shot Genco "just as he described the incident to Nanette Sanzo . . . " (District Attorney's brief to the Appellate Division, p. 24).

The New York Court of Appeals denied leave to appeal.

Federal Proceedings

District Court

On April 29, 1982, Coniglio filed a petition for a writ of Habeas Corpus pursuant to 28 U.S.C. §2254. The case was assigned to Hon. Whitman Knapp, who on October 22, 1982 denied the writ.

On November 3, 1982, Judge Knapp issued a certificate of probable cause to appeal to the Court of Appeals for the Second Circuit.

Court of Appeals

In his brief to the Court of Appeals, Coniglio argued that the alleged admission made to Sanzo could not be relied upon in determining the sufficiency of the evidence of his guilt. This argument was based upon the prosecution's asserted improper change in theory between trial and appeal.

The Second Circuit, in its opinion affirming the order of the District Court, did not rely upon the admission to Sanzo in its evaluation of the sufficiency of the evidence.

REASONS FOR GRANTING THE WRIT

This case involves an interesting and potentially frequent situation where a prosecution witness gives uncontradicted and corroborated testimony which negates an essential element of the crime. Here, Coniglio was charged as an accessory to the shooting death of a Tommy Genco. As an accessory, Coniglio,

in order to be properly convicted, had to be found to have shared the intent of the actual shooter. The testimony of a prosecution witness, Theresa Cicale, which was corroborated by other prosecution witnesses, was that just a minute or two prior to the shooting, Coniglio tried to induce her to come home with him, ostensibly for romantic purposes. Indeed, there was prosecution testimony that Coniglio tried to physically make her join him. Other than the fact of the shooting by another person a minute later, there was no additional evidence from which a jury could find that Coniglio joined in or had the requisite intent to kill Genco, except for evidence of flight. Under *Jackson v. Virginia*, the test is what a reasonable jury could find. Here, to disregard the testimony of Cicale is totally unreasonable. Only by disregarding her evidence, can the conviction be sustained.

Further, the proof of guilt is also deficient in that there is no real proof that Coniglio was in the car from which the shot which killed Genco was fired.

At the outset, it must be noted that the Second Circuit did not decide the issue of the propriety of the prosecution's use of the alleged admission to Nanette Sanzo. The Second Circuit did not include this admission in its analysis of the sufficiency of the evidence. Accordingly, for purposes of this petition, the sufficiency of the evidence will be discussed without reference to the admission to Sanzo.

Jackson v. Virginia, 443 U.S. 307, 324 (1979) sets forth the Federal Constitutional standard for sufficiency of the evidence to convict as whether upon the evidence on the record at trial " . . . no rational trier of fact could have found proof beyond a reasonable

doubt." Further, in order to find guilt beyond a reasonable doubt, there must be sufficient evidence as to each and every fact necessary to establish every essential element of the crime charged. *Davis v. United States,* 160 U.S. 469, 487 (1895); *Burks v. United States,* 437 U.S. 1 (1978); *United States v. Tavoularis,* 515 F.2d 1070, 1077 (2d Cir. 1975); see, *In re Winship,* 397 U.S. 358, 364 (1970). This rule of law means that no matter how strong the evidence at trial is as to one element, if as to another element the proof is not sufficient, the case must be dismissed. *Burks v. United States, supra.*

In this case, the proof of two elements; intent and presence in the car from which the shot was fired, were not proven beyond a reasonable doubt, as that standard is defined in *Jackson.*

Coniglio was charged as an accessory. Accessorial participation with an intent to kill is defined in §20.00 et seq. P.L. The key to such accessorial participation is that the accessory must act with the "mental culpability required for the commission thereof, and must solicit, request, command, importune, or intentionally aid the principal engaged in such conduct." In short, the accessory must share the intent of the principal actor to be held liable for the crime committed by the actor. *People v. LaBelle,* 18 N.Y.2d 405, 412 (1966); *People v. Monaco,* 14 N.Y.2d 43, 46 (1964); *People v. LaBruna,* 66 A.D.2d 300, 302 (4th Dept. 1979).

Thus, the key issue raised here is whether the evidence of Coniglio's intent before and at the instant of the shooting is sufficient. It is patently insufficient.

There is absolutely no evidence that Coniglio in any way participated in the shooting before it occurred, his mere presence[6] in the car and his presence at the dispute in the bar do not even approach the quantum of evidence required to find the requisite intent. In fact, the evidence is quite to the contrary, it establishes Coniglio's lack of intent.

Just moments before the shooting, Theresa Cicale was asked by Coniglio to come home with him or to go with him.[7] Therefore, it is obvious that immediately before the shooting, Coniglio could not have intended to participate in a homicide. For who asks a woman to come with him when he intends to kill someone. Cicale was a prosecution witness and her conversation with Coniglio outside the bar shortly before the shooting is corroborated by other prosecution witnesses. There is absolutely nothing further in the record to indicate that, in the brief, momentary gap between his invitation and the killing, Coniglio's intent changed from amorous to murderous. In fact, his invitation to Cicale shows that Coniglio was entirely unaware of any intention on the part of anyone to shoot Genco. Nor is there anything in the record which would indicate Coniglio did anything more than drive away after the shooting. This evidence of lack of intent just before the shooting must be considered under the reasonable inference standard of *Jackson*, for to disregard it would be entirely unreasonable. Absent any evidence on the crucial issue of intent at the time of the

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6. Assumed arguendo.

7. There was even some prosecution testimony that Coniglio tried to force her to come with him.

shooting, the case against Coniglio is not sufficient to sustain the conviction. *Fuller v. Anderson,* 662 F.2d 420 (6th Cir. 1981), *cert. denied* 30 CrL 4256, involving a remarkably similar intent issue, holds that evidence is insufficient to sustain a conviction where, as here, there was no evidence of intent to participate in the crime at the time of its commission. While the court found that one person did have such intent, it goes on to state: "assuming Zerious Meadows had this intent (to burn the house), however, there was noe vidence that it was shared by petitioner or the other boys." *Id.* at 414. Also, *Speigner v. Jago,* 603 F.2d 1208 (6th Cir. 1979).[8]

It must also be remembered that the Court gave a *Sandstrom*-type charge in this case. Putting aside the issue of whether the charge given here rises to the level of a constitutional violation and whether the issue was waived in the state courts, still this court, in evaluating the jury verdict, should take into consideration that the charge on intent permitted the jury to infer the intent to kill from the mere fact of the shooting. In this light, the jury's verdict can be more readily understood as an application of the inference rather than an evaluation of the evidence of intent.

The evidence that Coniglio drove away and that he could not be located for some time by the police, cannot supply the missing links. Evidence of flight, at best, is to be treated with caution and has only slight probative value. *People v. Yazum,* 13 N.Y.2d 302, 304 (1963); *People v. Fiorentino,* 197 N.Y. 560, 567 (1910); Richardson on Evidence, p. 135 (10th Ed. 1973).

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8. Cited with approval in *Jackson v. Virginia, supra* at 316 n.7.

Federal courts have consistently recognized that even "innocent people caught in a net of circumstance frequently . . . " flee. *Cooper v. United States*, 218 F.2d 394 (D.C. Cir. 1954); *Stacey v. Love*, 679 F.2d 1209 (6th Cir. 1982) (" . . . any fool faced with fear and foreboding can flee and hide.") The consistency of this position on the probative value of flight is further demonstrated by *Fuller v. Anderson, supra* and *Speigner v. Jago, supra*, where there was strong, clear evidence of flight. Still, the Sixth Circuit in those cases reversed the convictions.

In short, the evidence at trial showed that Coniglio had no intent to shoot or join in the shooting of Genco just a minute before Genco was shot. Other than the inherently weak flight evidence, there was nothing else upon which a reasonable jury could infer or find culpable intent. Therefore, the conviction cannot stand.

In actuality, there is a second element of the crime which was not sufficiently established; namely, that Coniglio was present at the scene of the crime. By the scene of the crime, what is meant is presence in the car from which the shot was fired. Mere presence in the bar is totally inaadequate to show presence at the car, which is the actual scene of the crime. Again, in analyzing the sufficiency of the evidence of presence, only reasonable inferences may be drawn. Careful analysis of the trial evidence leads to the conclusion that Coniglio was not in the car from which the shot was fired.

In light of the testimony of John Genco, there are only two possibilities: One, that Genco saw the car with the two men in it before the shooting occurred, or

he saw it after the shooting. In either event, only by resort to an unreasonable inference can Coniglio be found to be in the car from which Genco was killed.

The only testimony, even remotely identifying Coniglio or Clementi as being in any car which drove off is the testimony of John Genco, Genco's testimony was very specific that the car, in which he saw the shorter and taller men, was, at the time he saw it, backing up into the first intersection "up from the Cabaret." After looking at him, the two men sped away in the same direction from which they had come (i.e. back past the Cabaret). However, the testimony of DiGiorno, the only witness to the shooting, was that immediately after the shooting and as Tommy Genco fell back, the car in which Genco had been leaning " . . . just shot away." It must be noted that the car which Genco saw "had *backed up* the street (Buhre Avenue) right in front of my car . . . " (Emphasis supplied)

If it is assumed that Genco saw this car before the shooting occurred, it is absurd to find that the car Genco saw was involved in the murder.

It must be remembered that the "black car"[9] was originally parked right in front of the club. So too, Tommy Genco was standing right there. Thus, to accept the prosecution theory, we have to first find that Coniglio and Clementi got into the black car right in front of the club and right near Tommy Genco, then backed up the block for no apparent reason. There they were spotted by John Genco and stared at him;

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9. In the Grand Jury, Genco said it was a white car.

only to then drive back to the same spot they had left and shoot Genco. In order to keep this ridiculous theory alive, the prosecution below distorted the record. The prosecution in its brief to the Second Circuit (p. 5) states that "DiGiorno then saw the black car pull up in front of the bar" and then saw Tommy Genco walk over, lean in, and get shot. Aside from the timing difficulties in all this activity being completed in the short time it took John Genco to come around the corner in his car, the simple fact is that DiGiorno's testimony was that at the time he went outside the club, he saw "Tommy Genco was leaning in a car . . . " It is clear that in order to supply some link between the car backing up and the one DiGiorno saw, the prosecution wrongly asserted that DiGiorno saw this car in motion.

This incorrect assertion is crucial to a finding that the two cars were actually one. It gives the appearance of one continuous train of events [car backs up, car pulls forward (Genco loses sight of the car) then DiGiorno sees the car pull up]. However, there is absolutely no evidence that the black car from which the shot was fired ever moved before the shooting. Simply put, there is no evidence that the car in which John Genco says he saw Coniglio was the same car which DiGiorno saw. This absence of proof, itself creates a gulf in the case against Coniglio which distortions of the record will not bridge.

The other theory, that the shooting occurred after Genco saw the car with the two men, is just as preposterous. In fact, the testimony of Genco and DiGiorno can be harmonized only if *two* dark cars were involved. For DiGiorno was positive that after the shooting, the black car, from which the shot was

fired, " . . . just shot away." DiGiorno said nothing about seeing that car back up the block (Buhre Avenue) before speeding away. It is inconceivable that DiGiorno would not have seen the black car back up after the shooting if it had done so. Moreover, that there were two different cars is a far more reasonable view because it is highly unlikely that after shooting someone that the perpetrators would back up the block and stop, only to then drive past the scene again in order to flee.

In conclusion, the total lack of evidence of Coniglio's intent at the time of the shooting itself dooms this conviction. In addition, the evidence shows that the car in which he was riding, assuming arguendo the accuracy of the identification of Coniglio as being in the car seen by John Genco, could not have been the same one as the one from which Tommy Genco was shot.

While it is correct that *Jackson* and the due process clause set a standard on habeas corpus review that is difficult for a petitioner to meet, here, where evidence which comes from a prosecution witness is uncontradicted, corroborated, and negates an element of the crime, the conviction cannot stand.

This Court should grant the petition since this case raises the novel issue of the impact of exculpatory prosecution evidence on the *Jackson* standards. Moreover, this type of circumstance will inevitably arise many more times, and this Court should render an opinion in this case in order to give guidance to the Circuit Court.

CONCLUSION

FOR THE REASONS SET FORTH ABOVE, THE WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

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APPENDIX A

OPINION OF THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the Fourth day of March, One thousand nine hundred and eighty-three.

Present:
HONORABLE JAMES L. OAKES,
HONORABLE AMALYA L. KEARSE,
HONORABLE DOLORES K. SLOVITER,
Circuit Judges.

BENNY CONIGLIO,

Petitioner-Appellant,

v.

WARDEN, CLINTON CORRECTIONAL FACILITY,

Respondent-Appellee,

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by

counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

Petitioner Benny Coniglio, a state prisoner, appeals from a judgment of the United States District Court for the Southern District of New York, Whitman Knapp, *Judge*, denying his petition for a writ of habeas corpus. Coniglio contended principally that (1) under the standards of *Jackson v. Virginia*, 443 U.S. 307 (1979), the evidence was insufficient to sustain his murder conviction, and (2) the trial court's instructions on intent denied him due process under the principles set forth in *Sandstrom v. Montana*, 442 U.S. 510 (1979). Finding no merit in these or any of Coniglio's other contentions, we affirm the judgment.

The evidence adduced at petitioner's trial, viewed in the light most favorable to the prosecution, *see Jackson v. Virginia, supra*, 443 U.S. at 319, was adequate to permit a rational trier of fact to find Coniglio guilty of the murder of T. Genco. The jury could have found, *inter alia*, that on the night of the murder Coniglio and his companion Clementi were in the Cabaret Lounge, where they had a heated argument with T. Genco; that Clementi slapped T. Genco, following which Coniglio, while walking away, told T. Genco that the dispute "wasn't over;" that both Coniglio and Clementi were carrying guns; that thereafter Coniglio and Clementi were seen outside near a late-model black automobile; that Clementi had recently purchased a late-model black automobile; that a late-model black automobile carrying two men pulled up outside

the Cabaret Lounge; that T. Genco leaned inside, whereupon he was shot and mortally wounded; that the car sped away; that Coniglio fled from his home community and assumed a new identity. Even assuming, *arguendo*, that the jury was not to consider as evidence of Coniglio's guilt the statement he made to his girlfriend, Sanzo, that while seated in a car "he had shot someone in the head in the front of a bar in New York, over ten thousand dollars," the evidence was sufficient for the jury to find beyond a reasonable doubt that Coniglio either did the shooting or aided and abetted Clementi in the shooting.

As to Coniglio's *Sandstrom* claim, assuming that it is not barred by the doctrine of procedural default, *see Wainwright v. Sykes*, 433 U.S. 72 (1977), we conclude that the claim is meritless. The challenged portion of the charge merely informed the jury that it could "infer" that Coniglio intended the necessary and probable consequences of an act "done by him," and did not state that the law presumed such intent. As Coniglio has called to our attention no portion of the charge having the effect of shifting to him the burden of proving his innocence, we find no error. *See Sandstrom v. Montana*, 442 U.S. at 523-24; *Washington v. Harris*, 650 F.2d 447, 453 (2d Cir. 1981), *cert. denied*, 102 S. Ct. 1455 (1982).

The judgment is affirmed.

s/James L. Oakes
JAMES L. OAKES, U.S.C.J.

s/Amalya L. Kearse
AMALYA L. KEARSE, U.S.C.J.

s/Dolores K. Sloviter
DOLORES K. SLOVITER, U.S.C.J.

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

APPENDIX B
OPINION OF THE DISTRICT COURT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BENNY CONIGLIO,

Petitioner,

-against-

WARDEN, CLINTON CORRECTIONAL FACILITY

Respondent.

WHITMAN KNAPP, D.J.

Petitioner, having exhausted his state remedies, challenges on constitutional grounds his New York State conviction for murder in the second degree. The basic facts concerning the murder and the New York State trial are set forth in an Opinion by Judge Pollack denying a similar petition for habeas corpus by petitioner's co-defendant in the state trial (*Clementi v. Scully,* 81 Civ. 5137, Slip Op. dated October 20, 1981). They will not be restated.

Petitioner raises several constitutional issues. However, in the extraordinarily able brief his counsel presses only two of them: (1) that the evidence was not sufficient to meet the standard set forth in *Jackson v. Virginia* (1979) 443 U.S. 307; and (2) that the trial

court's instruction on intent violated the constitutional standard established in *Sandstrom v. Montana* (1979) 442 U.S. 510. Having examined the other questions presented by the petitioner and having concluded that counsel was well advised to abandon them, we turn to the arguments advanced in counsel's memorandum.

For the purposes of this opinion we accept without question the statement of facts set forth at pp. 1 through 7 of the petitioner's memorandum. That statement clearly establishes that the jury had before it evidence upon which it could rationally find the petitioners guilty beyond a reasonable doubt: there was considerable circumstantial evidence coupled with an admission alleged to have been made by the petitioner to his girlfriend. But then a strange thing happened—the prosecutor in his summation repudiated the admission (that is to say, he didn't question the veracity of the witness who testified to the admission, but urged the jury to disregard it as bragadocio), and took the position that the co-defendant and not the petitioner had fired the fatal shot. Petitioner now urges that we are bound by the prosecutor's summation and should disregard petitioner's alleged admission in determining whether the evidence before the jury met the *Jackson* standard. We do not so read *Jackson*. *Jackson* is an extremely narrow holding which prevents a conviction from standing in the total absence of supporting evidence. *See also, United States v. Tresvant* (4th Cir. 1982) 677 F.2d 1018, 1021. In the instant case there was supporting evidence before the jury and the prosecutor's rather unorthodox tactics cannot blunt that fact. *See also, Sales v. Harris* (2d Cir. 1982) 675 F.2d 532, 541.

With respect to the *Sandstrom* point, the petitioner's counsel concedes procedural default in presenting it to the state courts, but contends that there was "cause and prejudice" for the waiver. *See Wainwright v. Sykes* (1977) 433 U.S. 72, 87. Accepting, arguendo, the petitioner's position as to cause, we find no prejudice. The issue in this case was not intent, but identity. If the jury accepted the proposition that the petitioner and his co-defendant had been properly identified as the persons in the car from which the shot was fired, there is no rational reason for believing that the jury should have concluded that either such person acted without intent to kill. *Cf. Jordan v. Hammock* (2d Cir. 1982) 682 F.2d 52, 53.

Accordingly, the petition for habeas corpus is denied.

SO ORDERED.

Dated: New York, New York
October 20, 1982

WHITMAN KNAPP, U.S.D.J.